In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-75

UNITED STATES STEEL CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is not yet reported. The memorandum of the district court denying the petitioner's motion to dismiss the information (Pet. App. 24a-33a) is reported at 328 F. Supp. 354, and its memorandum denying petitioner's motion for judgment of acquittal or, in the alternative, for a new trial (Pet. App. 34a-35a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1973. A timely petition for rehearing was denied on June 8, 1973 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on July 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner, United States Steel Corporation, offered no evidence at trial of reliance on Corps of Engineers regulations as the reason for its otherwise unpermitted discharges into the Grand Calumet River, and did not assert any such reliance on appeal. Thereafter in *United States* v. *Pennsylvania Industrial Chemical Corp.*, No. 72-624, decided May 14, 1973, this Court held that evidence that a defendant had been "affirmatively misled" by those regulations would be a defense to the crime of which petitioner was convicted. The question presented is whether petitioner is entitled to have its conviction vacated so that it may introduce at retrial any evidence it might have of being "affirmatively misled."

STATUTES INVOLVED

Sections 13 and 16 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407 and 411, and portions of the Federal Water Pollution Control Act, are set forth in the petition (Pet. Br. 3; Pet. App. 35a-47a). Section 402(k) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. II) 1342(k), provides in pertinent part:

> * * * Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306 or 402 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information

reasonably required or requested in order to process the application. * * *

STATEMENT

This is a criminal prosecution, instituted by way of information, charging petitioner, United States Steel Corporation, with two counts of violating the Rivers and Harbors Act of 1899 (Refuse Act), 33 U.S.C. 407, and 33 U.S.C. 411, by discharging a quantity of a red-brown particulate sediment and an oily substance into the east branch of the Grand Calumet River. Petitioner moved to dismiss the information for failure to charge an offense against the United States. The motion was a wide-ranging comprehensive attack on the Refuse Act; it did not, however, allege that petitioner had been affirmatively misled by administrative construction of the Act. The district court denied the motion.

A jury trial was held in October 1972.[1] During trial petitioner did not attempt to show that it had been affirmatively misled by the Corps of Engineers into believing that it did not need a Refuse Act permit to discharge liquified refuse. Petitioner did offer two Corps of Engineers documents to prove the non-navigability of the Grand Calumet River. One document, Exhibit C, issued in 1969, dealt with the acquisition of work

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[1] On May 30, 1972, the Third Circuit held in *United States v. Pennsylvania Industrial Chemical Corp.*, 461 F. 2d 468, that it was error for a lower court to refuse an offer of proof that a defendant had been affirmatively misled by the Corps of Engineers into believing that it did not need a Refuse Act permit to discharge liquified waste. Petitioner participated as *amicus* before the Third Circuit in *PICCO*, and consequently was fully aware of that court's holding before it went to trial in this case. (This aspect of the Third Circuit's holding was subsequently upheld in this Court's *PICCO* opinion. Slip op. at 15-20.)

permits under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, for construction on navigable waterways under the jurisdiction of the Corps. Exhibit C was excluded by the court since it was issued two years after the date of the discharge in question and would only tend to confuse the jury (Tr. 480-490). The second document, Exhibit D, was issued in 1958 and dealt with Corps' policy for the issuance of permits for bridge construction over navigable waterways. The court initially admitted Exhibit D (Tr. 490) and excerpts of it were read to the jury (Tr. 497). After hearing the testimony of the Chicago District Counsel for the Corps of Engineers, the court determined that Exhibit D was not relevant to the issue of the River's navigability and struck from the record both Exhibit D and the testimony of Chicago District Counsel (Tr. 510-517).

Petitioner was convicted on both counts and was fined $2,500 on each count. On May 11, 1973, the court of appeals unanimously affirmed, concluding (1) that the Refuse Act was not intended exclusively to protect the navigability of navigable waterways but also protects against pollution (Pet. App. 7a); (2) that a permit to discharge refuse could have been obtained, since prior to the discharge by petitioner three permits to steel producers to discharge treated process water into the Calumet River were granted by the Corps (Pet. App. 17a); and (3) that petitioner's Exhibits C and D were properly excluded by the district court, since they did not support the contention that the Corps of Engineers had declared the Grand Calumet River a non-navigable waterway (Pet. App. 18a).

On May 14, 1973, this Court rendered its decision in *United States* v. *Pennsylvania Industrial Chemical Corp.*, No. 72-624. Thereafter petitioner moved in the

court of appeals for a rehearing, alleging that in light of *PICCO* it should have the opportunity to prove that it was affirmatively misled by Corps of Engineers regulations into believing that the Refuse Act did not apply to its discharges. On June 8, 1973, the court of appeals denied the petition. The court noted that in *PICCO*, "* * * the defendant offered to prove at trial that it relied in good faith on 33 C.F.R. §209.395 (1966) and 33 C.F.R. §209.200(e)(2) (1969) * * * and it raised the exclusion of such proof as an issue on appeal. Here, in contrast, * * * [petitioner] has pointed to no attempt in the trial below to prove that it actually relied upon them in making its discharges * * *", nor did it argue that any proof of reliance thereon was submitted and improperly excluded below (Pet. App. 23a-24a).

ARGUMENT

1. The court of appeals denied United States Steel Corporation's petition for a rehearing after expressly considering this Court's *PICCO* decision. The court of appeals reasoned that, unlike the defendant in *PICCO*, petitioner had made no effort to demonstrate reliance on Corps regulations, either in the trial court or on appeal, as the justification for its otherwise unpermitted discharge. This contrasts with the situation in *PICCO*, where this Court stated (slip op. at 19):

> At trial, PICCO offered to prove that, in reliance on the consistent, long-standing administrative construction of §13, the deposits in question were made in good faith belief that they were permissible under law. * * *
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> * * * At this stage it is sufficient that we hold that it was error for the District Court to refuse to permit PICCO to present evidence in support of its claim that it had been affirmatively misled into believing that the discharges in question were not a violation of the statute.

Here, the only documents petitioner attempted to introduce, and upon which it allegedly relied, were two public statements issued by the Corps in 1958 and 1969. We discuss below the propriety of the district court's exclusion of these materials. Suffice it to say at this point that these statements were introduced for the specific purpose of proving that the Corps did not consider the Grand Calumet River a navigable waterway in 1967, and not to demonstrate that their issuance had affirmatively misled the petitioner into believing that liquified discharge in 1967 was generally permissible under law. Indeed, petitioner did not in any way claim at trial that it had been affirmatively misled in that regard even though, as previously noted (*supra*, p. 3, n. 1), petitioner was aware at that time of the relevance of such a defense.

2. The petitioner contends that the "normal discharge of process, cooling and drainage water" is not a pollutant, supposedly because it is "normal," and also because this Court in *United States* v. *Standard Oil Co.*, 384 U.S. 224, did not specify that "process, cooling and drainage water" is within the general classification of refuse covered by the Act (Pet. 13, 16).

The nature of the refuse involved in this controversy was characterized by the government in its information as "red-brown particulate sediment" and an "oily substance", and not "drainage water." In 1960 this Court affirmed the propriety of injunctive relief in a case

involving the discharge of almost identical liquified refuse resulting from the steel manufacturing process, and dumped into the Calumet River. *United States* v. *Republic Steel Corp.*, 361 U.S. 482. That decision suggests no exemption for refuse discharged in a liquid state other than municipal sewage (see 362 U.S. at 490-491); and the plain language of the statute, "any refuse matter of any kind or description whatever," clearly includes the discharge involved here.[2]

Petitioner further argues that this Court has not considered the relationship between the Federal Water Pollution Control Act and Section 13 of the Refuse Act, particularly as it affects the discharge of normal process, cooling and drainage water (Pet. 16-18). But, as we have seen, the refuse involved here is not exempt under the Act or this Court's previous rulings, and in *PICCO* this Court considered at length the relationship between the Federal Water Pollution Control Act and Section 13 of the Refuse Act, and expressly concluded that the two statutes are not in conflict (slip op. at 14) and that Section 13 prohibits discharges which cause pollution as well as those that affect navigation (slip op. at 15-17). Moreover, the petitioner's fears that 23,000 applicants for permits under the program established by Sections 401 *et seq.* of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. II) 1341 *et seq.*, are about to be prosecuted by the United States for violating Section 13 of the Refuse Act should

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[2] In *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230, this Court construed "refuse" as including "all foreign substances and pollutants." See also *PICCO*, *supra*, slip op. at 15-17, and *United States* v. *Interlake Steel Corp.*, 297 F. Supp. 912, 916 (N.D. Ill.), cited by this Court in *PICCO*, slip op. at 17, also involving the discharge of refuse similar to that involved here.

be allayed by Section 402(k), 33 U.S.C. (Supp. II) 1342(k), which provides in pertinent part:

> Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of * * * section 13 of the Act of March 3, 1899 * * *.

3. Petitioner further contends that the district court improperly excluded the two public statements (Exhibits C and D) made by the Corps of Engineers in 1958 and 1969, and thus "deprive[d] Petitioner of the opportunity of presenting its defense [that the Grand Calumet was not navigable] to the jury" (Pet. 15). The 1958 statement was issued for the sole purpose of identifying those navigable waterways where approval was required by the Secretary of the Army for bridge construction (Pet. App. 21a), and the 1969 statement was issued for the purpose of identifying waterways wherein the Corps exercised control over works that would require permits under Section 10 of the Refuse Act, 33 U.S.C. 403.

Navigability of a river turns upon whether it was a waterway in its state of nature, or whether it could be made so with reasonable improvements. *Economy Light and Power Co.* v. *United States*, 256 U.S. 113; *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 408. The exercise of control by the Corps of Engineers of works on a particular waterway would not, as the court of appeals found, "* * * be determinative of whether the waterway is navigable in the legal sense" (Pet. App. 21a). Both documents in question here are expressly directed to matters other than the navigability of the waterway (*e.g.*, approval for bridge construction

and works), and the 1969 statement could not, for any purpose, be determinative of navigability on the date of discharge in 1967.

In any event, the petitioner's contention that the Grand Calumet is not a navigable river suggests that the left hand—in discharging refuse into the Grand Calumet River in 1967—did not know what the right hand had done—in paying for the annual dredging of similar refuse in the same river since 1951 in order to preserve its navigability. *United States* v. *Republic Steel Corporation*, 155 F. Supp. 442, 450 (N.D. Ill.); *United States* v. *Republic Steel Corporation*, 286 F. 2d 875, 888 (C.A. 7).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

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